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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 437

SAGER GLOVE CORPORATION,
Petitioner,

vs.

AETNA INSURANCE COMPANY, ET AL.,
Respondents.

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Justices of the United States Supreme Court:

MAY IT PLEASE THE COURT:

Respondents respectfully submit that petitioner (sometimes hereinafter referred to simply as "Sager"), presents no valid or meritorious ground for the issuance of *certiorari*.

The case itself presents no constitutional question. There are no other questions still open to review in this Court.

Why Certiorari Should Not Be Granted.

First: Petitioner presents no ground showing that *certiorari* should be granted for any of the reasons mentioned in Rule 19 of this Court.

Second: The only question, if any, presented here, whether the proper entry of summary judgment (*in a case where the court has found that there was no genuine issue as to any material fact*) is a deprivation of the right of jury trial and a violation of the Seventh Amendment to the United States Constitution, has long been settled adversely to petitioner's contention (see Argument, *post*).

Third: In any event, petitioner is precluded from raising any constitutional question here since it failed to raise such question in the District Court. Petitioner never even presented such question to the Court of Appeals, unless it can be said to have been presented by petitioner's petition for rehearing in that Court, filed after the opinion was rendered by that Court.

Fourth: The single issue upon which petitioner predicates its petition is not a matter vested with public or general importance.

Fifth: The opinion of The Court of Appeals (7th Cir.) is not in conflict with any opinion rendered by the Court of Appeals of any other circuit.

Sixth: This Court does not ordinarily review the propriety of the District Court in entering summary judgment, particularly, as is the case here, where the trial court has found, as a matter of local substantive law, that no genuine issue existed as to any material fact.

Petitioner says (Pet. p. 9):

> "This is a case in which the lower Federal courts have treated as a question of law or issue that which is a

question of fact and have therefore denied petitioner his right to a trial by jury under the Seventh Amendment."

This *ipse dixit* conclusion finds no support either in the record, or in the findings and conclusions of the District Court or the Court of Appeals. The District Court did not treat as a question of law that which was a question of fact. The District Court, in entering summary judgment drew proper conclusions of law, but *only after it appeared that there were no disputed questions of fact.* Indeed, such conclusions of law were inescapable in light of the uncontradicted state of the facts, measured by Sager's own documents and affidavits.

Had petitioner, in its petition here, informed this Court what really happened in the District Court and in the Court of Appeals, petitioner, itself, would have shown that it has no possible claim to the right of further review. In light of the glaring deficiencies of petitioner's purported "Statement Of The Case," it is imperative that respondents briefly recount the essential elements of the proceedings below, so that the issues may be fairly and understandably presented.

The Real Nature of the Proceedings Below.

On January 12, 1956, Sager commenced an action on insurance policies issued by respondents (insurers), seeking to recover for loss allegedly caused by acts of vandalism and malicious mischief. The pivotal defense raised by the insurers was that the action, commenced on January 12, 1956, was barred by express provisions, common to all of the policies:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this polic shall

have been complied with, and *unless commenced within twelve months next after inception of the loss.*" (Emphasis supplied.)

The insurers moved for summary judgment, supported by affidavits showing that Sager's action was commenced long beyond the "twelve months next after the inception of the loss." In opposition, Sager filed counter documents showing, on their face, that the loss occurred in 1953 (almost three years before Sager's action was commenced). Such documents demonstrated that Sager had not "discovered" the losses until January 14, 1955, and that Sager was under the mistaken impression, an impression without legal justification, that the twelve month time limit for filing action did not commence until the date it "discovered" the loss. In addition, by such affidavits (filed about six years after the commencement of the action) Sager belatedly contended that, even if the time limit started with the occurrence of the loss. (sic: 1953), such time limit was "waived", such claim of "waiver" being predicated on the ground that the insurers had investigated the loss by conducting, on several dates, an examination, under oath, of Sager's president.

Thus, only two pivotal questions were presented to the District Court on the motion for summary judgment:

(1) Did the twelve month time limit start with the happening of the loss (1953) or the Sager's "discovery" of the loss (in 1955)?

(2) If the time limit started with the happening of the loss (1953), did any act of the insurers actually mislead Sager into believing that such time limit had been waived, or did the law imply a waiver from any such conduct?

The District Court granted the insurer's motion for summary judgment, since, from Sager's own documents, it appeared that the action had been filed at a date long

beyond twelve months after the inception of the loss; moreover, Sager's own documents affirmatively established that no act by the insurers led Sager to believe that the twelve month time limit was waived. The District Court properly ruled that no act on the part of the insurers created an implied waiver, as measured by the applicable Illinois law.

Contrary to Sager's protestation here (Pet. p. 4, 5, 6) the insurers never predicated their defense on tardy or late *notice* of the loss by Sager. Such issue was never involved in the rulings of the District Court or the Court of Appeals.

Despite Sager's statements here (Pet. p. 4, 6), the alleged *subjective* state of mind of its president was never an issue, and certainly not a question of fact, because Sager's own affidavits and documents, offered in opposition to the motion for summary judgment, affirmatively established, *as a matter of uncontradicted fact*, that although Sager's president might have been under misapprehension as to when the time limit commenced for starting action, nevertheless, neither he nor Sager ever believed that the time limit had been waived by the insurers. Indeed, Sager's own documents (App. 89, 96) affirmatively established that such time limit had not been waived by the insurers, and that Sager, even up to the date of filing suit, recognized that the insurers had not waived the time limit (App. 96). The subjective state of mind of Sager's president was never a material question of fact. The Court of Appeals by its ruling made this clear (Opinion, Pet. p. 13, 16).

Nevertheless, upon this wisp of untenable theory, Sager has labored to contrive a purported constitutional question, hoping thereby to gain the ear of this Court. This strategy is dictated by desperation, since petitioner itself recognizes that unless it can "create" a constitutional question,

it has no right to further review by this Court of any question of substantive law in this case, for as petitioner says (Pet. p. 4):

> "* * * Mindful that this Court does not ordinarily review the concordant resolution of lower Federal Courts upon a question of state law, petitioner does not renew that purely local question here."

Petitioner, in Reality, Is Asking for Another Review of the Questions of Substantive State Law.

Sager's petition does no more than argue that the lower Federal Courts have misapplied questions of state law (Pet. p. 6). Sager, itself, concedes that "such cases do not usually evoke this court's writ of certiorari" (Pet. p. 9). Every substantive question in this case has already been resolved adversely to Sager, by the District Court and the Court of Appeals, on the basis of settled Illinois law. There is no constitutional question. Sager has no claim to the right of further review here. This is more than amply clear from an analysis of the rulings of the Court of Appeals.

As to the question whether the time limit for commencing suit on the policies started with the happening or inception of the loss (in 1953), or upon Sager's "discovery" of the loss (in 1955) the Court of Appeals said (Opinion, Pet. p. 13):

> "* * * It is our conclusion that the meaning of the phrase is quite clear. It has nothing to do with the state of mind of the respondent. It deals with the objective fact which in the context of this case is a specific act of vandalism or malicious mischief. The loss occurs and has its 'inception' whether or not the insured knows of it."

As to the question whether Sager's action, commenced in 1956, was timely or whether it was barred, the Court of Appeals said (Opinion, Pet. p. 13):

> "Time of discovery of the loss by the insured is immaterial, and it appears from the pleadings that suit was not brought within twelve months of any acts of vandalism or malicious mischief * * *. * * *"

As to the question whether Sager or its president was misled into believing that the insurers had waived the time limit, the Court of Appeals said (Opinion, Pet. p. 16):

> "* * * Plaintiff realized that it was required by the provisions of its policies to bring suit within twelve months of the loss and was not in fact led to believe that the defendants would not rely on the time for suit limitation. * * *"

With respect to the question whether any of the acts of the insurers could be deemed to have created a waiver, implied by law, the Court of Appeals said (Opinion, Pet. p. 16):

> "Defendants' investigation of the claimed loss did not bring its conduct within the scope of the rule of implied waiver exemplified by the Illinois authorities. Defendants denied liability shortly after being notified of the loss and during the ensuing investigation never retreated from that position. There were no negotiations between the parties looking toward settlement. * * * We conclude that the doctrine of implied waiver may not be extended to encompass the factual situation before us."

Further in the Opinion (Pet. p. 17) the Court of Appeals said:

> "* * * The facts not open to question show there was no waiver under Illinois law. * * *"

The issues resolved by the Court of Appeals were the only issues in the case as such appeal was brought to that

Court. This is clear from Sager's own statement of the contested issues on appeal (Sager's Brief in the Court of Appeals, p. 5), where Sager listed as the only contested issues on Appeal the following:

> "(a) Where two mutually exclusive provisions appear in the same insurance policy as prerequisites to commencing suit, can the Defendant claim the benefit of both to defeat the claim or does it waive or toll one prerequisite by claiming the benefit of the second?
>
> (b) Are losses by reason of vandalism and malicious mischief barred after the lapse of one year even though not discovered until after the passage of that period of time?
>
> (c) Does expiration of an insurance policy more than a year prior to suit bar recovery of an undiscovered loss even when a new or renewal policy is issued by the same Company so as to give continuous and uninterrupted coverage?
>
> (d) Does the limitation period contained in insurance policies commence to run with the beginning of a series of acts of vandalism and malicious mischief or does it commence to run only when the act is completed and the loss sustained?"

All of these issues, plainly matters of substantive Illinois law, were settled by the Court of Appeals. Such matters are not ordinarily open to further review here. Notwithstanding Sager, under the guise of creating a constitutional question says in its petition here (Pet. p. 5):

> "It is petitioner's contention here, as it was in the courts below, that under Illinois law, the question whether an insurance company that has a defense on the ground of late notice waives that defense by treating with the assured in apparent recognition of at least the existence if not the merit of the claim of loss, waives their defense is a question, not of law, but of fact."

We are compelled to again observe that there was no question of "late notice," but even if petitioner, by reference thereto, has in mind *the tardy filing of its action*, the contention urged by petitioner is wholly without merit. This involves no constitutional question. It is no more than a restatement of one of the basic issues of substantive law raised by Sager below, an issue which the Court of Appeals has resolved adversely to Sager. There was no question of fact in the case at bar, because Sager's own showing, upon the motion for summary judgment, affirmatively established that Sager was not misled into believing that there was a waiver; that at all times Sager recognized that the insurers had not waived the time limit for filing suit. Such showing by Sager made the entry of summary judgment inevitable, for as said by the Court of Appeals (Opinion, Pet. p. 14):

> "There is no genuine issue as to any material fact relevant to the question of waiver. * * *"

In its argument, Sager places reliance upon *Chicago and Western Indiana R. R. Co. v. Guaranty Co. of North America*, 267 Ill. App. 483. In that case, patently distinguishable from the situation here, the insurers had actively participated in settlement negotiations, a circumstance which the court concluded could have, at law, created a waiver. In that case there was evidence of extended negotiations, conferences and correspondence suggesting that a settlement, without litigation, was possible. Such facts were not present in the case here. Sager conceded that there had been *no* negotiations for settlement (App. 93). This was recognized by the Court of Appeals in its opinion (Opinion, Pet. p. 16). The *Chicago and Western Indiana R. R. Co.* case, also cited by Sager to the Court of Appeals, was considered by that Court, and shown to have been patently distinguishable (Opinion, Pet. p. 16).

Petitioner, in its petition, p. 8, cites *Elgin J. & E. Railway Company* v. *Burley*, 325 U. S. 711, and ostensibly sets forth a twenty line quotation from *this* Court's opinion in that case. We have examined this Court's opinion in the *Elgin* case. No part of such purported quotation is contained in *this* Court's opinion. Petitioner has erroneously attributed to this Court, language appearing in the opinion, in the same case, of the Court of Appeals, 7th Circuit, reported 140 Fed. 2d 488. The first eight lines of the quotation appear in the printed decision of the Court of Appeals on page 490 thereof. Nevertheless, within the *apparent* quotation from the opinion (no ultimate quotation mark appears to designate the end of the quotation), the next twelve lines are obviously comment and argument by petitioner's counsel. The purported quotation is, of course, not a quotation from any opinion of *this* Court, and indeed, *in the totality as presented*, is not an accurate quotation of any court.

However, brushing aside such patent errors, examination of the opinion of the Court of Appeals, 140 Fed. 2d 488, reveals that such decision merely reiterated the familiar rules governing the entry of summary judgment, pointing out that if there are any genuine questions of fact presented on the record in proceedings for summary judgment, summary judgment should not be entered. We are in complete accord with this rule, but in the instant case *there were no questions of fact;* all material questions of fact were undisputed and the District Court was manifestly required to enter summary judgment in favor of defendants. However in the *Elgin* case Court of Appeals discerningly reviewed the purpose of summary judgment, saying, p. 490:

> "The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party

> should have judgment in accordance with the motion for summary judgment. * * *"

In the case here, the District Court followed this admonition and such ruling was properly affirmed on review.

It may be pertinently asked: Where is there any constitutional question in the case at bar? Where has it been shown that Sager has been deprived of any vested right of trial by jury? *No such constitutional question ever existed in this case.* In light of any fair statement of the proceedings below, it is clear that the matters which Sager, in its petition here, chooses to call questions of fact, were not disputed questions of fact. Hence, any argument based upon such self-serving conclusion is shown to be meretricious. Moreover, under familiar and settled rules (*Ellis v. Dixon*, 349 U. S. 458, 99 L. Ed. 1231), Sager, having failed to raise any such spurious constitutional question (sic: deprivation of right of jury trial) in the District Court, could not validly raise any such question in the Court of Appeals, much less here in the United States Supreme Court.

It is not without significance that the spurious constitutional question was never injected in this case until a petition for rehearing was filed after the Court of Appeals had rendered its opinion. Even then, in such petition for rehearing, the spurious constitutional question, at best an amorphous concept, was belatedly injected by counsel who presents the petition here, such counsel being the last (the ninth) in a long parade of successive counsel representing Sager in its claim here.

In reality, Sager's argument here is no more than a querulous complaint that the Court of Appeals has ruled adversely to Sager on matters of Illinois substantive law. The so-called "question presented for review" (Pet. p. 3) does not correctly or fairly present the situation. The

only question, if any, which can be deemed to be raised by petitioner, in light of the proceedings below is: Does the proper entry of summary judgment, upon uncontradicted evidence, unlawfully deprive the losing litigant of the right of jury trial? As we demonstrate in our Argument (*post*), the entry of summary judgment under such circumstances does not constitute a deprivation of the right of jury trial and is not a violation of the Seventh Amendment to the United States Constitution.

ARGUMENT.

I.

THE GRANTING OF SUMMARY JUDGMENT UPON A FINDING THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT IS NOT A DEPRIVATION OF THE RIGHT OF JURY TRIAL PROVIDED FOR UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As shown above and as is plainly discernible from the record below there were no disputed questions of fact; the circumstances shown by Sager itself demonstrated that it had not been led to believe that the insurers had waived the time limit. The District Court was required to enter summary judgment for the insurers. The entry of summary judgment under such circumstances is not violative of the guaranty of jury trial afforded by the Seventh Amendment. See *U. S.* v. *Stangland*, 242 F. 2d 843 (C. of A., 7th Cir.), where the appellant, as here, contended that an adjudication against him, by way of summary judgment, was violative of the Seventh Amendment. The Court of Appeals said, p. 848:

> "* * * Surely, the granting of a motion for summary judgment where there is no genuine issue of fact is not a denial of the right to trial by jury guaranteed by the Seventh Amendment. * * *"

In so ruling, the Court of Appeals (Seventh Circuit) was guided by the precepts of this Court in *Fidelity and Deposit Co. of Maryland* v. *U. S.*, 187 U. S. 315, 47 L. Ed. 194. There, this Court considered whether a rule of the Supreme Court of the District of Columbia, authorizing judgment for plaintiff for want of a sufficient affidavit of defense by de-

fendant, constituted a deprivation of the constitutional right of jury trial. This Court held that such ruling was not a constitutional deprivation. The logic and reasoning of this Court in arriving at such conclusion has equally apt application to the issue, if any, presented here. This Court, speaking through Mr. Justice McKenna, said (47 L. Ed. 198):

> "* * * The purpose of the rule is to preserve the Court from frivolous defenses, and to defeat attempts to use formal pleading as a means to delay the recovery of just demands.
>
> "Certainly a salutary purpose, and hardly less essential to justice than the ultimate means of trial."

This Court concluded that such a procedural rule, aimed at eliminating frivolous defenses was not a deprivation of the constitutional right to a jury trial. By the same reasoning, Sager's frivolous defense of "waiver" was properly eliminated from this case by the entry of the Summary Judgment.

II.

THE FACTS CONCERNING "WAIVER" WERE NOT DISPUTED BUT EVEN IF THEY WERE DISPUTED THE SUPREME COURT OF THE UNITED STATES WILL NOT ORDINARILY INTERFERE WHERE THE CONCLUSION OF THE COURT OF APPEALS DEPENDS ON APPRECIATION OF CIRCUMSTANCES WHICH ADMIT OF DIFFERENT INTERPRETATION.

Respondents have demonstrated that both the District Court and the Court of Appeals found that the circumstances (upon which petitioner bases its claim of waiver) did not admit of dispute or different interpretation. But, *arguendo*, even if such circumstances did admit of different interpretation, the Supreme Court of the United States will not ordinarily interfere. As said by this Court in *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U. S. 498, 95 L. Ed. 479, 482:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. * * * In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations.' * * * * * *"

Sager contends (Pet. p. 6) that the District Court erred in entering summary judgment, and in failing to submit to a jury a matter which Sager viewed as a question of fact. Such claimed errors are not ordinarily subject to review by this Court on certiorari, or even on appeal. In *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 62 L. Ed. 385, the petitioner contended, as does Sager here, that the trial court erred in refusing to submit certain questions of fact to the jury. This Court refused to review the judgment below, saying, p. 385:

"* * * the propriety of submitting these matters depended essentially upon an appreciation of all the evidence. Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above stated claims to warrant a finding in their favor and the circuit court of appeals reached the same result.

"The record discloses no sufficient reason why we should review the judgment below. * * *"

We have cited the foregoing decisions of this Court to show that even if the showing upon summary judgment had been subject to disputation, this Court would not ordinarily grant *certiorari*. However, there were no disputed questions in the case at bar. Manifestly, *certiorari* should not be granted in such a case.

III.

CERTIORARI IS NOT ORDINARILY GRANTED IN CASES LACKING PRINCIPLES OF IMPORTANCE TO THE PUBLIC, OR WHERE THERE IS A CONFLICT BETWEEN THE COURTS OF APPEAL, OR WHERE THE LOWER COURTS HAVE APPLIED LOCAL STATE LAW.

While the granting of *certiorari* is, of course, a matter of discretion with this Court, yet, as manifested from the declarations of policy in the many decisions, this Court rarely grants *certiorari* unless the case involves considerations of public interest, or unless the Court is asked to reconcile conflicts between Courts of Appeal. As said by this Court in *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U. S. 498, 95 L. Ed. 479, 482:

> "* * * Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. * * *"

This view has long been settled law. (See *Rice* v. *Sioux City Cemetery, Inc., et al.*, 349 U. S. 70, 99 L. Ed. 897, 904; *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393, 67 L. Ed. 712, 714.)

In the case here, there is no issue of importance to the public, as distinguished from that of the parties; nor is there any conflict between the opinion of the Court of Appeals for the Seventh Circuit and any other Court of Appeals; and, as we have pointed out earlier in this answer, Sager's plea for *certiorari* is not founded on any of the grounds suggested in Rule 19 of this Court.

As plainly appears from the opinion of the Court of Appeals, the District Court, in reaching the results below, merely applied the local substantive law of Illinois, and the Court of Appeals approved the application of such state law. Sager's petition here, which, in essence, does no more than complain that the state law has been improperly applied, does not bring itself within the purview of the type of case in which *certiorari* is ordinarily granted. As said by this Court in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667, 94 L. Ed. 1194, 1201:

> "* * * we do not re-examine the local law as applied by the lower courts."

To like effect, see *Sims v. U. S.*, 359 U. S. 108, 3 L. Ed. 2d 667, where this Court held that the conclusion of a Court of Appeals with respect to the application of state law, founded on reason and authority, will be accepted by this Court, and will not be reviewed.

We respectfully submit that the case submitted by the petition here is not one in which *certiorari* should be granted.

CONCLUSION.

In reality, there is no issue of substantive law open for review here. There is no constitutional question. The results reached below stem from Sager's own act and conduct, as affirmatively established by Sager's own documents. There was no disputed issue of fact, and hence, no basis for any argument that Sager was entitled to a jury trial. The District Court entered summary judgment in complete accord with the spirit and letter of the governing Federal Rule. There has been no failure of justice here. The rulings below speak only of orderly administration of the law. Sager has had its full day in court. It is entitled to no more than that.

It is respectfully submitted that the petition for *certiorari* should be denied.

Respectfully submitted,

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